

(2012) 04 CAL CK 0012

Calcutta High Court

Case No: Writ Petition No. 20473 (W) of 2008

Bulbultala Cold Storage

APPELLANT

Vs

The State of West Bengal and
Others

RESPONDENT

Date of Decision: April 12, 2012

Acts Referred:

- Arbitration Act, 1940 - Section 2(b), 26(6), 30, 33, 41
- Constitution of India, 1950 - Article 226
- Electricity Act, 2003 - Section 26, 26(6), 26(7), 36(2), 52

Citation: (2012) 3 CALLT 468

Hon'ble Judges: Aniruddha Bose, J

Bench: Single Bench

Advocate: S. Talukdar and Mr. R Jaiswal, for the Appellant; S.K. Panja and Mr. S.S. Koley, for the Respondent

Final Decision: Dismissed

Judgement

Aniruddha Bose, J.

In this petition the petitioners challenge the validity of four orders passed on 22 May 1995 by the Electrical Inspector, West Bengal, by which the electricity meter of the petitioner has been found to be 66.6 per cent slow. As a consequence of such finding, four electricity bills raised on the petitioners for the months of December of the year 1993 and April, September-October and November of the year 1994 were directed to be revised. The petitioners' business involve operating a cold storage, in respect of which the meter was installed. The petitioner No. 1 is a company incorporated under the provisions of the Companies Act, 1956 and the petitioner No. 2 is a director of that company. The petitioner No. 1 and the West Bengal State Electricity Board (the predecessors of the respondent No. 4) had executed an agreement for supply of electrical energy. The agreement was executed on 14

January 1988, in pursuance of which electricity was being supplied to the petitioners. Clause 27 of this agreement, a copy of which has been made Annexure P-1 to the writ petition contained an arbitration clause:-

Should any dispute or difference arise between the Board and the Consumer relating to any of the matters in this agreement, the same shall be referable to two arbitrators, one to be appointed by each party to the dispute and the provisions of the Arbitration Act, 1940 shall apply to such agreement in all other respects.

2. There has been a pending dispute as regards the correctness of their electricity meter from the month of November 1993. The origin of the dispute was the monthly bills from that month, which the petitioners found inflated. Initially, the petitioners requested the Chief Electrical Inspector to remove defect in the said meter. In the writ petition, it has been pleaded that such request was made to the Chief Electrical Inspector (respondent No. 2) as an Arbitrator.

3. It appears that such request had failed to evoke any response. The petitioners thereafter applied before the learned Chief Judge, City Civil Court for interim order under the provisions of section 41 of the Arbitration Act, 1940 Act and several applications for interim orders were filed. The Arbitration Suit was registered as Title Suit No. 3830 of 1994. In the pleadings of Title Suit No. 3830 of 1994, a copy of which was made available to this Court by the learned counsel for the petitioners, there is reference to four miscellaneous applications, registered as Misc. Case No. 848/1994, 2840/93, 1645/94 and 2031/94. In the writ petition, however there is no reference to Misc. Case No. 1645/94 and 2031/94. From the statements made in paragraphs 6 and 7 of the writ petition, I find that altogether three applications have been referred to, which were registered as Misc. Case No. 848 of 1994, Misc. Case No. 2245 of 1994 and Misc. Case No. 2840 of 1993. In Misc. Case No. 2840 of 1993, the following order was issued on 13 January 1994:-

that the Chief Electrical Inspector, respondent No. 3, the arbitrator is directed to immediately take steps for testing the meter of the petitioners' Cold Storage upon notice to all the parties and determine the dispute and pass an award within 3 months from the date of the order and also directed not to disconnect the electric line, in the meantime.

In the meantime the petitioner is directed to deposit a sum of Rs. 35,000/- for the month December, 1993 in the office of the respondents by 1.2.94 failing which the above order in the proceedings paragraph shall be treated as vacated. The aforesaid amount will be kept in the suspense account of the respondents to be adjusted subsequently and the petitioner is also directed that he shall go on paying the subsequent lawful electrical bills in respect of the energy consumed in the said cold storage within the prescribed period.

Similar orders were passed in Misc. Case No. 2245 of 1994 on 9 November 1994, and Misc. Case No. 848 of 1994 on 23 May 1994. The former interlocutory application

related to bills for the months of September and October 1994 and the petitioner was directed to deposit a sum of Rs. 1,45,000/-. The latter application related to the month of April 1994 and the sum directed to be deposited is Rs. 1,30,000/-.

4. So far as the main, suit, i.e. T.S. No. 3830 of 1994 is concerned, on 23 December 1994 an order was passed directing the Chief Electrical Inspector to take immediate steps for completion of the adjudication of the Arbitration proceedings pending before him, as referred to him by the petitioners, within three months from the date of the order. The authorities were directed not to disconnect the electricity line of the petitioner in the meantime. It was further directed:-

In the meantime the petitioner is directed to deposit a sum of Rs. 60,000/- towards the bills for the months of November, 1994 by 16.1.95, failing which the above order in the preceding paragraph shall be treated as vacated. The aforesaid amount will be kept in the suspense account of the respondents to be adjusted subsequently and the petitioner is also directed that he shall go on paying the subsequent lawful electrical bills in respect of the energy consumed in the said cold storage within the prescribed period.

5. The meter was actually removed on 7 December 1994, and was tested in the laboratory of the Chief Electrical Inspector. Such removal was made in presence of the representatives of the petitioners and the erstwhile Board. The Electrical Inspector, West Bengal gave his finding in respect of Meter No. 310048 recording it to be 66.6% slow. Against the description MD1, under the column "Meter No. /KWH", finding recorded was "66% slow". Four separate orders were issued with the same recordal, and in all these orders, it was ordered that the West Bengal State Electricity Board was to revise the bills for the respective months. The months covered were December 1993, September 1994, April 1994 and November 1994. All these orders were issued on 22 February 1995.

6. The petitioners thereafter filed an application under sections 30 and 33 of the Arbitration Act, 1940 for setting aside the orders dated 22 February 1995. It is apparent that the petitioners at that point of time treated these orders as awards in the arbitration proceeding. All the four orders of the Electrical Inspector were challenged in the same application. The petitioners had brought that action, which was registered as Misc. Case No. 511 of 1995, (M/s. Bulbulitala Cold Storage v. S.R. Dasgupta & Ors.) for quashing the said orders containing the aforesaid directions of the Electrical Inspector on the basis that these were awards. This application was heard by the learned Judge presiding over the Second Bench of the City Civil Court. By an order passed on 23 July 2008, this application was dismissed. It was found that the aforesaid orders were not "award" within the meaning of section 2(b) of the Arbitration Act, 1940. In this order, it was held:-

The order impugned itself made it clear that the matter was taken up by the Electrical Inspector for testing the meter in question as per direction of the learned

Chief Judge and specific direction was given to the West Bengal State Electricity Board to revise the bill the disputed months as per meter testing result. That order cannot be termed as an award. Section 52 of the Indian Electricity Act provides machinery for the appointment of an Arbitrator where any matter was directed to be determined by arbitration, the matter shall, unless it is otherwise expressly provided in the license of a licensee, be determined by such person or persons as the State Govt. may nominate in that behalf on the application of either party. Provided that whether the Government or the State Electricity Board as a party to a dispute, the dispute shall be referred two Arbitrators, one to be appointed by each party to the dispute. It has been held in a decision reported in AIR 1987(Delhi) at page 104 that since the decision of the Electrical Inspector under Clause-VI(3) of the schedule of the Act does not constitute an arbitration agreement between the parties, the decision of the Electrical Inspector would not be final and an appeal could be filed against that order. Apart from this Clause 27 of the agreement being not invoked by the parties for appointment of Arbitrator, the impugned orders cannot be said to be an award as per definition of section 2(b) of the said Act.

After careful consideration and submission of both sides and materials on record, I am of the view that the misc. case is not maintainable in law and liable to be dismissed.

7. After the said order of dismissal was passed, the petitioners invoked the Constitutional Writ Jurisdiction of this Court in bringing this action. It has been submitted on behalf of the petitioners that the proceedings before the learned City Civil Court were instituted on assumption and on legal advice that there was a valid arbitration agreement between the parties and the law relating to arbitration was applicable. Summary of submissions of the petitioners in explaining the past proceedings is that those cases were filed bona fide on legal but on mistake of law.

8. Now the petitioners are contending that the steps were taken by the Electrical Inspector in terms of section 26(6) of the Act and not as per the arbitration agreement. In effect, the reasoning given in the order of the Learned Second Judge, City Civil Court passed on 23 July 2008 has been indirectly accepted by the petitioners. In this proceeding, the petitioners assail the test reports and the consequential directions issued by the Electrical Inspector in the four impugned memorandums, all dated 22 February 1995. Validity of these test reports have been questioned mainly on procedural grounds. It has been argued that testing of the meter was done without any representation from the petitioners' side. According to the petitioners, this constitutes arriving at a finding without giving opportunity of hearing to the petitioners, and hence violative of the principles of natural justice.

9. The second ground on which raising of fresh demand upon detection of defect is challenged is that such demand is time barred. Drawing my attention to the provisions of Sub-section (6) of section 26 of the Act. learned counsel for the petitioners has argued that revised charges could not have been imposed

pertaining to the period beyond six months from the date the meter was found to be defective. It is additional submission of the petitioners that the bills pertain to period beyond that permissible under the agreement and the General Conditions of Supply also. Provisions of section 26(6) of the Act stipulates:-

6. Where any difference or dispute arises as to whether any meter referred to in sub-section (1) is or is not correct, the matter shall be decided, upon the application of either party, by an Electrical Inspector, and where the meter has, in the opinion of such Inspector ceased to be correct, such Inspector shall estimate the amount of the energy supplied to the consumer or the electrical quantity contained in the supply, during such time, not exceeding six months, as the meter shall not, in the opinion of such Inspector, have been correct; but save as aforesaid, the register of the meter shall, in the absence of fraud, be conclusive proof of such amount or quantity:

In this case, the meter was removed on 7 December 1994 and the order directing revision of bills was made on 22 February 1995. Bills for the months of December 1993, April 1994, September-October 1994 and November 1994 were directed to be revised. Two of these bills undoubtedly relate to a period, being for the months of December, 1993 and April 1994, beyond the six month timeframe.

10. A flaw, technical in nature, has also been pointed out by the learned counsel for the petitioners, in relation to testing of the meter. A case is made out that the meter was removed and tested without Current Transformer (C.T.) and Potential Transformer (P.T.) including wiring circuit. These components, according to the petitioners form integral part of the metering system, and without them, testing of the meter would not give correct results. The decision relied upon in support of this contention is a Judgment of the Supreme Court in the case of [U.P.S.E.B. Vs. ATMA Steels and Others](#), . On the aspect of breach of the principles of natural justice, the authority cited is a decision of Delhi High Court, H.D. Shourie v. Municipal Corporation of Delhi & Anr., AIR 1987 Del 219. The other judgment referred to on behalf of the petitioners is the case of Parameshwar Kumar v. B.S.E.B. reported in AIR 1989 Patna 197 in support of their submission that the provision relating to retrospective billing in case of a defective meter as contained in section 26(6) of the Act or the agreement guiding the supply arrangement is required to be adhered to.

11. On behalf of the respondents, this petition is resisted on the ground of there being alternative remedy. It has been argued that against an order passed u/s 26(6) of the Electricity Act 1910, there is provision relating to appeal u/s 36(2) of the Act. On the question of violation of the principles of natural justice in having the meter tested, the case of the respondents is that what the Electrical Inspector has done is only having the meter tested in a laboratory. This exercise was in the nature of testing of the meter by an expert, and at that stage there was no necessity of giving opportunity of hearing to the petitioners. As regards applicability of the arbitration clause, stand of the respondents is that clause 27 of the supply agreement has no role in the subject controversy, as the petitioners themselves had referred the

matter to the Chief Electrical Inspector and not to the arbitrators In the manner contemplated in the said clause.

12. On the question of testing the meter without CT/PT and wiring circuit, contention of the respondents is that the learned Judge, City Civil Court had directed the authorities only to check the meter, and no other apparatus in addition to meter. This was not a matter under the provisions of Section 26(7) of the Act. In the case of U.P.S.E.B. v. Atma Steels (supra), it is pointed out on behalf of the respondents that dispute arose out of a fuse getting blown off in the P.T. Specific complain was made that the P.T. and the meter paneling were not working properly. In that case, it was held that the transformer had to be regarded as a meter within the meaning of that word under the provisions of section 26(7) of the 1910 Act, In this case, provisions of section 26(6) of the said Act is applicable, which relates to the meter alone, and not other apparatus.

13. In this writ petition, however before going into the merits of the matter, I shall examine first as to whether I should exercise my jurisdiction under Article 226 of the Constitution of India to test the legality of the four orders passed by the Electrical Inspector. The orders which are under challenge before me were issued by the Electrical Inspector as per direction of the Civil Judge exercising jurisdiction under the provisions of the Arbitration Act. In fact, the four orders were issued under specific direction passed in an Arbitration Suit. When these four orders were challenged in a proceeding for setting aside an award, the learned City Civil Court found these orders did not constitute award u/s 2(b) of the 1940 Act.

14. After such finding was given by the City Civil Court, the petitioners have questioned the orders containing direction for revising the bill on the basis of opinion of the Electrical Inspector, treating such direction to have been made under the provisions of section 26(6) of the Act of. 1910. It is a fact that the arbitration proceeding was not proceeded in this matter in the manner provided in clause 27 of the supply agreement.

15. In my opinion, however, I cannot assume jurisdiction on the subject dispute exercising my power under Article 226 of the Constitution of India, which dispute arises out of directions issued in an Arbitration Suit. In Misc. Case No. 511 of 1995, finding of the City Civil Court is that the impugned orders do not constitute award. I have referred to the order passed in the application under sections 30 and 33 of the Arbitration Act, 1940 in the preceding paragraphs. The learned Judge, in that order has clarified In detail as to why the impugned orders do not constitute an award. First reason disclosed is that the Electrical Inspector did not sign as Arbitrator. It was observed in this order:-

The Electrical Inspector to passed that order in pursuance of the order of the learned Chief Judge, City Civil Court in 4 aforesaid misc. cases for testing the meter to the Laboratory of the Chief Electrical Inspector, Govt. of West Bengal. From the

Order No. 3 dated 23.12.94 passed by the Ld. Chief Judge in Title Suit No. 3830/94 I find that proforma respondent No. 3 Chief Electrical Inspector was directed to take immediate steps for completion of the adjudication of the Arbitration proceeding pending before him within 3 months from the date of order and also directed the authority concerned not to disconnect the electric line of the petitioner in the meantime. Next date was fixed on 28.3.95 for return and order. None of the cases were disposed of by the learned Chief Judge. There is nothing on record to show that whether the Chief Electrical Inspector submitted that order before the learned Chief Judge or not after compliance of the order. This Court being not the Appellate Court, the petitioner challenged the said orders by filing an application u/s 30/ 33 of the Arbitration Act. It is well settled that stamp duty is payable on award u/s 12 of the Stamp Act. Section 30 of the Arbitration Act mandates that the award of an Arbitrator shall not be set aside except on one or more of the grounds specified in the section. Section 33 of the Arbitration Act provides that any question regarding the existence or validity of the Arbitration agreement has to be brought before the Court and no such question can be raised before the Arbitrator. Not a single document is forthcoming from the side of the petitioner that the opposite parties took part in the arbitration proceeding without protest and fully availed of the entire Arbitration proceedings.

16. It is apparent from these observations that the City Civil Court dismissed the said application filed under the provisions of sections 30 and 33 of the 1940 Act on the ground that the orders impugned were not awards. But mere dismissal of that proceeding does not alter the birthmark of the impugned orders issued on 22 February 1995, passed in terms of directions issued in an Arbitration Suit. It is true that reference was not made in terms of Clause 27 of the Supply Agreement. But then, in an Arbitration Suit, the Court has wide power and jurisdiction u/s 41 of the 1940 Act to pass interim order. Merely because an application challenging certain orders passed by the Electrical Inspector, which orders were passed in pursuance of directions of the Arbitration Court, is dismissed on the ground that the impugned orders do not constitute award, the impugned orders cannot automatically transform their character and become orders passed u/s 26(6) of the Act of 1910. The condition precedent for attracting the power of testing a meter under this provision of the 1910 Act is an application before the Electricity Inspector. There was no such application here. On the other hand, the power of the Electricity Inspector was exercised in pursuance of direction of the learned City Civil Court, in exercise of jurisdiction under the Arbitration Act. 1940.

17. None of the parties to this proceeding however has challenged the order of the City Civil Court passed on 23 July 2008 in Misc. Case 511/95. In this writ petition, the petitioners have assailed the steps taken by the respondent Nos. 2 and 3, being the Chief Electrical Inspector and the Electrical Inspector. In this litigation, aim of the petitioners is to efface out the entire proceedings undertaken in pursuance of directions of the City Civil Court. But in my opinion, a writ petition is not the proper

course for setting aside orders passed in pursuance of directions of the Arbitration Court in connection with an agreement which has a valid arbitration clause.

18. On behalf of the respondents, point was taken that arbitrator was not appointed in respect of the dispute raised in accordance with the procedures outlined in the agreement, to which the parties had agreed to. But that is a matter for the Arbitration Court to examine. The Writ Court would not examine that issue. The order in Misc. Case No. 511/95 does not mandate that the entire set of orders passed by the City Civil Court is void. The finding in the order passed on 23 July 2008 is that the four impugned orders are not awards within the meaning of section 2(b) of the 1940 Act. If that is the case, the said order of 23 July 2008 cannot be construed to have invalidated the entire proceeding before the City Civil Court. In such a case, the orders impugned would constitute interim orders passed in an Arbitration Suit. Mere submission that the proceedings were instituted before the learned City Civil Court under wrong legal advice cannot permit the petitioners to invoke the Constitutional Writ Jurisdiction of this Court assailing the orders of electricity authorities passed in pursuance of directions of the said Court in the said proceeding.

19. On behalf of the petitioners, it was argued that since this Court had already entered into merits in this case, now the petitioners ought not to be non suited on the ground of availability of alternative remedy. On this point, a judgment of the Supreme Court delivered in the case reported in [L. Hirday Narain Vs. Income Tax Officer, Bareilly](#), was referred to. Had the impugned orders been issued under the provisions of section 26(6) of the 1910 Act, I might have had addressed the issues on merit. My own view on this point however is that the orders in question were not passed under the provisions of section 26(6) of the 1910 Act. The maintainability of the said suit and connected proceedings have not been assailed before the appropriate legal forum. Such forum is sought to be bypassed by the petitioners on the ground that those proceedings were instituted under wrong legal advice. I, however, do not think the forum chosen was wrong. In relation to disputes arising out of an agreement containing arbitration clause, where interim orders are necessary, or Court's direction becomes necessary to refer the matter to an arbitrator or a panel of arbitrators, an Arbitration Suit is the appropriate legal proceeding. If Arbitrators were not appointed in the manner contemplated in the agreement, proper course for the petitioners, or for that matter the respondents, was to apply for appropriate directions in the said suit, or before any other higher legal forum having jurisdiction to test the orders of the Court of first instance in such a case. Having obtained the orders in an arbitration suit, the Writ Court cannot be approached to set aside those orders on the ground that proceedings had been instituted under mistaken legal advice, but the orders acquired an altered character, deemed to have been passed u/s 26(6) of the 1910 Act. In a case of this nature, where the petitioners' stand is inconsistent, the Writ Court would decline to exercise its discretion in entertaining the writ petition.

20. The petitioners here have not challenged the order passed on 23rd July 2008 in Misc. Case No. 511/95. That order, to the extent the same dismisses the application for setting aside the award has attained finality. The finding of the Electrical Inspector thus survives. I have declined to interfere with such finding as the orders were issued in pursuance of direction of the City Civil Court in an Arbitration Suit. For this reason, I do not consider it necessary to examine the ratio of the decisions cited before me. I, however, give liberty to the petitioners to take appropriate steps in accordance with the provisions of Arbitration Act 1940 or any other law applicable on the subject controversy for challenging the said finding of the Electrical Inspector. If any such application is filed, the petitioner shall be entitled to seek condonation of delay in instituting such proceeding considering the fact that this matter was pending before this Court till today.

Urgent Photostat certified copy of this judgment be supplied to the learned Advocates for the parties if applied for with necessary formalities as expeditiously as possible.